Supreme Court, U.S.
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No.

In the
Supreme Court of the United States
October Term, 1994

WILLIAM CHAPLIN,

Petitioner,

v.

JANINE ANNE BAKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTIONS PRESENTED

1) Whether the text of the Fourth Amendment constitutes "clearly established law" for qualified immunity purposes when applied to a police officer who is acting to protect the life of the President of the United States.

2) Whether the Supreme Court of Minnesota departed from the requirements of this Court's decisions when it denied the petitioner's claim of qualified immunity on the ground that a jury could conclude that no reasonable officer could find the petitioner's actions lawful.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the City of Minneapolis was a defendant below, but is not an appellant in this case.

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JANINE ANNE BAKER,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

William Chaplin petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case.

OPINIONS BELOW

The decision of the Supreme Court of Minnesota (App. at 1a-15a)[1] is reported at 517 N.W.2d 911. The decision of the Court of Appeals of Minnesota (App. at 16a-25a) is reported at 497 N.W.2d 314. The decision of the state district court (App. at 26a-40a) is not reported.

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[1] All citations to "App." are to the appendix to this petition.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on June 30, 1994. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. The facts are undisputed because they were captured on videotape by a Minneapolis, Minnesota television station. The videotape was part of the record below and the parties agreed that the videotape was accurate. App. at 4a n.1.

2. On September 27, 1990, respondent Janine Baker attended a demonstration against President George Bush in downtown Minneapolis. App. at 3a. The protest took place in front of the hotel where President Bush was speaking. *Id.* at 18a. The Minneapolis Police Department expected the crowd to be large and assigned numerous officers to monitor the demonstration; one of those officers was petitioner William Chaplin, a sergeant with the Minneapolis Police Department and a supervisor in the police department's Emergency Response Unit. *Id.* at 19a.

Ms. Baker was at the protest dressed as President Bush: she had donned a full-head rubber mask resembling the President and was dressed in a man's business suit. App. at 18a. She remained masked at all times relevant to this case. The videotape shows that Baker demonstrated in the street for awhile before the police moved her and the rest of the crowd behind barriers that the City had erected for the President's and the crowd's safety.

President Bush's motorcade was due in the area at any moment. App. at 44a. The videotape of the incident shows that several protestors broke through the safety barriers and rushed into the street. As officers tried to move the crowd back, the videotape shows that Ms. Baker pushed over (or at least appeared to push over) one of the barricades. App. at 44a. It is undisputed that Sergeant Chaplin responded by striking Baker once in the middle of the chest with his riot baton. *See* App. at 44a. The incident was over.

The Minneapolis Police Department's Internal Affairs Unit investigated the incident and fully exonerated Sergeant Chaplin from all charges relating to the incident.

3. On October 9, 1991, Baker sued Chaplin and the City of Minneapolis in state district court. Baker sought recovery under 42 U.S.C. § 1983 on the theory that Chaplin's conduct violated the Fourth Amendment. Before significant discovery and other pretrial proceedings had occurred, Chaplin moved for summary judgment on grounds of federal qualified immunity. The state district court denied Chaplin's motion, holding that the law governing Chaplin's actions in protecting the President was clearly established and that there was a factual dispute whether reasonable officers could have found Chaplin's conduct to be lawful. App. at 26a-38a.

4. Chaplin took an interlocutory appeal to the Court of Appeals of Minnesota. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Anderson v. City of Hopkins*, 393 N.W.2d 363 (Minn. 1986). The Court of Appeals of Minnesota affirmed the district court's decision in all respects. App. at 16a-25a.

5. Chaplin petitioned the Supreme Court of Minnesota for discretionary review of the Court of Appeals' decision with respect to the federal qualified immunity issue. The Supreme Court of Minnesota granted review and affirmed the Court of Appeals' decision.

a. The court first considered whether the law governing Chaplin's actions was "clearly established" at the time he acted. The court recognized that "[m]ere statements of constitutional principles are too vague to offer guidance to police officers in the field" (App. at 7a), but went on to follow two federal circuits in holding that Chaplin's use of force was governed by "clearly established law" because "[t]he use of excessive force

was clearly prohibited by a general constitutional standard" — to wit, the Fourth Amendment itself. App. at 10a.

b. Having determined that the Fourth Amendment constituted "clearly established law" governing Chaplin's actions, the court turned to the question whether any reasonable officer could have believed Chaplin's actions to be lawful in light of the Fourth Amendment. The court held: "A jury could conclude based on clearly established law, police department training materials, expert testimony and testimony regarding Baker's and Chaplin's actions that no objectively reasonable police officer would find Chaplin's use of force lawful." App. at 14a. The court stated that because it could not conclude as a matter of law that Chaplin's actions were reasonable, it was required to deny his claim of qualified immunity and remand the case for trial. *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

1. The Supreme Court of Minnesota's error in this case is both manifest and dangerous, for this case involves an official who was charged with protecting the life of the President of the United States. Qualified immunity is broad in the usual case, but it must be at its zenith in cases involving presidential protection. As Justice Scalia stated in his concurring opinion in *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534 (1991), "it [is] worthwhile to establish that this Court will not let such a mistake stand with respect to those who guard the life of the President." *Hunter*, 502 U.S. at ---, 112 S.Ct. at 537 (Scalia, J., concurring).

2. Chaplin is entitled to summary judgment on qualified immunity grounds if a reasonable officer could have believed Chaplin's actions to be lawful in light of clearly established law and the information Chaplin possessed at the time he acted. *Hunter*, 502 U.S. at ---, 112 S.Ct. at 536; *Anderson v.*

Creighton, 483 U.S. 635, 638 (1987); *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[2] Immunity evaporates only if "it is obvious that no reasonably competent officer would have concluded" that Chaplin's conduct was legal in light of clearly established law. *Malley*, 475 U.S. at 341. Qualified immunity represents the norm for executive officers. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). This broad grant of immunity rests on the need to assure governmental officials who make judgment calls that their actions will not be met by lawsuits in close cases, lest the fear of lawsuits dampen their willingness to do their jobs. *Id.* at 807, 814. The public interest demands "vigorous exercise of official authority" and benefits from qualified immunity. *Butz v. Economou*, 438 U.S. 478, 506 (1978).

The qualified immunity inquiry consists of two parts. First, the *plaintiff* must establish that the law governing the official's actions was "clearly established" at the time of the events in question. *Davis v. Scherer*, 468 U.S. 183, 197 (1984). The law governing an official's conduct is "clearly established" only if the right the official is alleged to have violated has been defined in such a way that a reasonable officer would understand that his or her *particular actions* violate that right. *Anderson*, 483 U.S. at 640. Mere statements of general constitutional rules do not constitute "clearly established law" for immunity purposes because they give officials no guidance in particular circumstances. *Id.* at 639.

If the law governing the official's actions is "clearly established," the next question is whether any reasonable officer could find the defendant's actions lawful in light of that clearly established law. *Hunter*, 502 U.S. at ---, 112 S.Ct. at 537; *Malley*, 475 U.S. at 341. "[I]f officers of reasonable

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[2] Federal law governs the application of qualified immunity in state courts. *Howlett v. Rose*, 496 U.S. 356, 376 (1990).

competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341. This part of the immunity inquiry presents a legal question for the court to resolve. *Hunter*, 502 U.S. at ---, 112 S.Ct. at 536-37; *Mitchell*, 472 U.S. at 526.

Although portions of the Supreme Court of Minnesota's opinion accurately set forth these principles, the court proceeded to overlook them in its actual analysis of the case by holding that the general Fourth Amendment standard itself constituted "clearly established law" governing Chaplin's actions and that the question whether reasonably competent officers could conclude that Chaplin's conduct was lawful was a factual question for the jury to resolve. The lower court's analysis will dampen the vigilance of officials who are protecting the President of the United States from harm; officials will fear that any action they take will lead to a lawsuit, thus leading them to choose inaction over action in protecting the President's life.

3. There is a split in lower court authority regarding whether the Fourth Amendment's unreasonable seizures clause constitutes "clearly established law" for purposes of qualified immunity. The Supreme Court of Minnesota, following the approach of two federal circuits, held that the Fourth Amendment's general prohibition of unreasonable seizures constitutes "clearly established law" for purposes of qualified immunity. App. at 8a. At least two other federal circuits have held otherwise, relying on this Court's decision in *Anderson v. Creighton*. Because the definition of "clearly established law" is central to every case involving the defense of qualified immunity, resolution of this issue is of great importance to both federal and state courts.

The "clearly established law" requirement exists to ensure that officials are not held liable unless they take action in violation of *clear* rules. If the law does not provide concrete

guidance to officers in particular circumstances, they should not be required to guess at how the law will apply to their actions and suffer a lawsuit if they are wrong. *See Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991).

Defining "clearly established law" depends first upon proper definition of the specific legal rule that the official allegedly violated. In *Anderson*, this Court cautioned lower courts to take care in selecting the level of generality at which they define the "clearly established law" for purposes of qualified immunity:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality . . . Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson, 483 U.S. at 639. The right the official is alleged to have violated must be "more particularized" to the officer's actual actions before the law can be considered "clearly established" for immunity purposes. *Id.* at 640.

Anderson's discussion of the Due Process Clause should apply equally to the Fourth Amendment's unreasonable seizures clause. The command of the Fourth Amendment to "act reasonably" in effecting seizures, like the command of the Fifth and Fourteenth Amendments to "afford due process," is stated at a very high level of generality. It is a standard that

relies heavily on analysis of all facts and circumstances to give it content. *See Graham v. Connor*, 490 U.S. 386 (1990). Thus, an officer acting in the field has little idea what the admonitions to "act reasonably" and "afford due process" mean unless those admonitions have been defined by cases applying those general rules to particular factual circumstances. Calling the Fourth Amendment's prohibition of unreasonable seizures "clearly established law" would eliminate qualified immunity in many Fourth Amendment cases.

Baker was unable to identify any cases applying the Fourth Amendment to the circumstances Chaplin faced when he acted. Indeed, Baker identified (and Chaplin could find) no cases applying the Fourth Amendment to an official acting *in any way* to protect the life of the President of the United States. Baker relied instead on the Fourth Amendment itself, arguing that it was clearly established in 1990 that the Fourth Amendment prohibited unreasonable seizures. The Supreme Court of Minnesota agreed.

This Court has never directly addressed the issue whether the Fourth Amendment's prohibition of unreasonable seizures alone constitutes "clearly established law" for qualified immunity purposes. The issue has split the lower courts.

Two federal circuits have explicitly held that the Fourth Amendment's unreasonable seizures clause does not constitute "clearly established law" for qualified immunity purposes in the absence of cases applying that general standard to closely analogous cases. In *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993), the Seventh Circuit reversed the district court's denial of a summary judgment motion based on qualified immunity because the plaintiff had failed to identify any cases applying the general provisions of the Fourth Amendment to the specific facts in that case:

> The district court determined that the law was clearly established at the time of the arrest that the use of excessive force to effect an arrest violated the Constitution. * * * Under the prevailing law, [the plaintiff] had the burden to point out a closely analogous case that established that he had a constitutional right to be free from the type of force the police officers used on him -- some kind of a hit in the back that knocked him to the ground as he attempted to escape after arrest. * * * [The plaintiff] introduced only cases which established the general right to be protected from a police officer's use of excessive force. As we have stated: "The words 'clearly established . . . constitutional rights' may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms. . . . The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful."

Rice, 999 F.2d at 1174, quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987).

Similarly, in *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), the Eleventh Circuit stated: "The question . . . is not whether it is clearly established that unreasonable seizures are prohibited; they are." *Barts*, 865 F.2d at 1190. Instead, the Eleventh Circuit asked whether it was clearly established that the officer's *particular actions* in that case (taking a potential murder witness and some of her family members to the police station for questioning when the witness had initiated contact with the police by reporting the murder) violated the Fourth Amendment's unreasonable seizures clause. *Id.* The court held that the law with respect to those particular facts was not clearly established when the defendant acted, remarking:

> The line between the lawful and the unlawful is often vague. *Harlow*'s "clearly established" standard demands that a bright line be crossed. The line is not to be found in abstractions -- to act reasonably, to act with probable cause, and so forth -- but in studying how these abstractions have been applied in concrete circumstances.

Barts, 865 F.2d at 1194 (footnote omitted).

The United States Court of Appeals for the District of Columbia endorsed this approach in *Hobson v. Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), stating that a standard that simply parrots language in the Bill of Rights does not constitute "clearly established law" for immunity purposes.

By contrast, other courts, including the Supreme Court of Minnesota in this case, have held that the general prohibition of excessive force constitutes "clearly established law" for immunity purposes. For example, the Second Circuit, in *Calamia v. City of New York*, 879 F.2d 1025, 1036 (2d Cir. 1989), rejected a claim of entitlement to immunity as a matter of law[3] simply by stating: "The right of an individual not to be subjected to excessive force has long been clearly established." The Tenth Circuit held similarly in *Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991), reversing a jury verdict in favor of police officers because the jury had found the officers' use of force to be unreasonable. The court rejected an immunity claim by pointing out that the law regarding use of force was clearly established because "[a] citizen has the right to be free from unreasonable force when being arrested or detained by a law enforcement officer" and "[n]o officer could reasonably

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[3] The court ultimately reversed the district court's denial of the immunity defense based on a jury's findings after a trial because of an error in instructing the jury.

believe that use of unreasonable force did not violate clearly established law." *Id.* The Fifth Circuit did likewise in *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994), holding simply: "It is well settled that if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated."

The Fourth Amendment's prohibition of unreasonable seizures and excessive force was indeed "clearly established" in 1990, as it has been since 1791. But the general command to "act reasonably" cannot constitute "clearly established law" *for purposes of qualified immunity* because it is far too general to be of any guidance to officers in the field. This is because what is "reasonable" in any given case depends in large part on what is being protected. The amount of force that a police officer reasonably may use in protecting someone's wallet is different than the amount of force that he or she may use in protecting somebody's life. But Presidential protection is *sui generis*. It is hard to think of something in need of greater protection than the President's life, given the fact that both the likelihood and the consequences of an attack on the President are vastly greater than they are with an attack on anyone else in the world.

At the time Chaplin acted, there were no cases applying the Fourth Amendment to a case involving a potential threat to the President. Thus, there were no cases that explained what constitutes "reasonable force" when protecting the President of the United States. While Chaplin would not be entitled to immunity just because there is no case addressing every precise circumstance he faced (*Anderson*, 483 U.S. at 640), he should be entitled to immunity when there is no case that applies the Fourth Amendment to the *most important fact* in this case: he was charged with protecting the President of the United States. The complete lack of cases applying the Fourth Amendment to an official acting to protect the President

means that the law governing Chaplin's actions was not clearly established. Consequently, he is entitled to immunity.

4. Only if the law governing the defendant's actions is "clearly established" does a court need to move to the next step in the inquiry: the question whether any reasonable officer could conclude that the defendant's actions were lawful. That question is one of law to be decided by the court. *Hunter*, 502 U.S. at ---, 112 S.Ct. at 537; *Mitchell*, 472 U.S. at 528 & n.9. However, the Supreme Court of Minnesota denied petitioner's claim of immunity because "a jury could conclude . . . that no objectively reasonable police officer would find Chaplin's use of force lawful." App. at 14a.

The Supreme Court of Minnesota did more than merely disobey this Court's holdings regarding who, between the court and the jury, makes the qualified immunity determination. The court went further and held that in order to grant immunity to petitioner, it would have to "conclude as a matter of law that Chaplin's actions were reasonable." App. at 15a. This conflates the substantive Fourth Amendment inquiry with the qualified immunity inquiry and amounts to a holding that officials must establish not that reasonable officers could debate the legality of the action taken, but that the actions were substantively proper as a matter of law. That does not square with longstanding principles of qualified immunity, which hold that officials may be immune *even when* they err. *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974).

Because the facts and circumstances surrounding Chaplin's use of force are undisputed,[4] this Court may properly

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[4] The circumstances surrounding Chaplin's use of force were captured on videotape that both parties agreed was an accurate depiction of events. Thus, the Supreme Court of Minnesota's statement (App. at 4a, 13a) that there are disputed facts regarding the circumstances surrounding Chaplin's use of force is simply incorrect.

address the purely legal question whether reasonable officers could conclude that Chaplin's actions were lawful. At the very worst, reasonable officers could debate whether Chaplin's actions were reasonable under the circumstances that existed when he acted, thus triggering immunity. The videotaped record shows a situation that was (to borrow a phrase from *Graham*) "tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 397. The crowd was large. The President's motorcade soon would be in the area. App. at 44a. The protestors were becoming agitated; from time to time they breached the secured perimeter established by the Secret Service and the police. Indeed, the crowd was so agitated that the Secret Service determined a security risk existed. App. at 44a. Suddenly, a masked protestor (Baker) pushed a barricade over, breaching the secured perimeter once again. Chaplin reacted immediately by striking Baker once in the chest with his riot baton, just as officers are trained to do in order to control crowd members who are perceived to pose a threat to security. App. at 44a-45a. It is undisputed that Chaplin did not repeatedly strike Baker or strike her in a manner calculated to do serious permanent injury by, for example, striking her in the head or throat. He struck her once to prevent what he reasonably thought could be a threat to the President. The videotape shows that when the threat was over, Chaplin left Baker alone. The Minneapolis Police Department's Internal Affairs Unit ultimately exonerated Chaplin from any wrongdoing and dismissed Baker's administrative complaint against him.

Officials charged with protecting the life of the President of the United States should not be forced to wait until a potential threat to the President becomes imminent before taking action to defuse it. Immunity exists so that officials will not "err always on the side of caution." *Davis*, 468 U.S. at 196. This principle is nowhere more important than when the President's life is at stake. This is certainly an area where

"action deferred will be futile," or worse. *Scheuer*, 416 U.S. at 246. Officials protecting the President must be able to vigilantly repel any *conceivable* threat to the President's life while the threat is still in its infancy.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of Minnesota because Chaplin is entitled to qualified immunity as a matter of law based on the undisputed facts in this case.

Respectfully submitted.

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SEPTEMBER 1994

STATE OF MINNESOTA

IN SUPREME COURT

C7-92-1622

Court of Appeals

Gardebring, J.
Took no part, Wahl, J.

Janine Anne Baker,

Respondent,

vs.

Filed: June 30, 1994
Office of Appellate Courts

William Chaplin, individually and
in his official capacity as a
Minneapolis Police Officer, petitioner,

Appellant,

City of Minneapolis,

Defendant.

SYLLABUS

1. Where the plaintiff, facing a claim of qualified immunity, has shown that the defendant's alleged actions were clearly prohibited by a general constitutional standard, the contours of which were further established by statute, and that this standard was incorporated in training materials used by the police department, the law governing a police officer's

actions was clearly established at the time that the defendant acted.

2. Where the plaintiff has established the existence of a genuine issue of material fact as to the underlying facts necessary to determine the reasonableness of the officer's actions as a matter of law, summary judgment for the defendant officer on qualified immunity was properly denied.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

The respondent in this case, Janine Baker, brought a claim under 42 U.S.C. § 1983 for excessive use of force and claims under state law for assault and battery against William Chaplin, a Minneapolis police officer, for using excessive force when he hit her with a riot baton. The incident occurred while Chaplin was engaged in crowd control during a visit to Minneapolis by President Bush on September 27, 1990. The trial court denied summary judgment for Chaplin on both Baker's state law claims and her federal § 1983 claim. The court of appeals affirmed. Appellant Chaplin seeks review of the order denying him summary judgment on Baker's federal law claim and asserts that he is entitled to qualified immunity from Baker's § 1983 claim. Based on our conclusions that the law regarding excessive use of force was clearly established at the time Chaplin acted, and that disputes exist regarding genuine issues of material fact necessary to determine whether Chaplin's actions were reasonable, we affirm.

Some of the facts underlying this lawsuit are uncontested. Both parties agree that Baker participated in a demonstration which took place during President Bush's visit to Minneapolis on September 27, 1990. Baker and other protesters stood behind wooden police barriers which formed a corner at the intersection of LaSalle Avenue and Grant Street. Baker stood in the front row directly behind the Grant Street barricade; other protestors stood behind her and a barricade stood to her left along LaSalle Avenue. At some point, the barricade in front of Baker fell over. Police officers directed the demonstrators to move back and re-erected the fallen barricade. The LaSalle Avenue barricade alongside the protestors and next to Baker then fell over. Chaplin immediately moved forward through a line of police officers

and struck Baker by thrusting the end of his riot baton into her chest. Chaplin did not make any move to arrest or restrain Baker. Baker was later diagnosed with a sternal contusion and damage to cartilage and other soft tissue in her chest.

There are several key areas of disagreement between the parties regarding this incident. At the time of the summary judgment motion, evidence was presented by Baker and Chaplin in the form of affidavits and documentary material to support their positions on the contested issues. First, the parties dispute Baker's actions prior to being struck by Chaplin. Baker asserts that she did not move forward, cross the police barricades, or attempt to interfere with police officers. She states in her affidavit that she merely placed her hand on the barricade to steady herself and that shortly thereafter it fell over. Baker submitted a videotape of the incident[1] and an affidavit from another protester to support her statement. Chaplin states in his affidavit that the crowd was surging forward and that Baker knocked or pushed over the barricade and crossed into the security area.

Another area of disagreement concerns the location of Baker's injury. Baker asserts that Chaplin struck her in the sternum. She submitted a medical report stating that her injuries typically represent "an actual bruise to the sternum itself" and that the injuries could very well have been caused by being struck in the sternal area with a riot baton at the place, date, and time of her injury. Chaplin states in his affidavit that he struck Baker in "the middle of the chest" and asserts that he struck her in the solar plexus. Chaplin has produced no evidence supporting his assertion, but claims that confirmation of his assertion can be adduced by viewing the videotape.

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[1]The videotape submitted by Baker was filmed by a local news crew and is part of the trial court record.

The parties also dispute the nature of Chaplin's use of force. Baker claims that Chaplin used a full thrust of his baton; Chaplin claims he used a "short thrust," a crowd control technique which he was trained to use. Baker submitted affidavits from two experts in the field of police tactics and training. Both experts found that the blow was not a "short thrust," but described it as a "full thrust assault" or "deadly force."[2] Baker's experts stated that the force used was excessive, unjustified and unreasonable.

Baker also submitted a police department manual and other materials showing some of the training police officers receive regarding the appropriate use of force. The police department manual includes Minn. Stat. § 609.066, which defines deadly force and codifies the justifications for its use. One of the statutory justifications, as paraphrased in the manual, is "to protect themselves or others from apparent death or great bodily harm." The training materials also instruct on proper use of the baton. The police department manual states in part:

> Officers are expected to be aware of the fact that a blow to certain parts of the human body can cause immediate death, or grievous injury that can lead to a permanent physical or mental incapacity or eventual death. Areas susceptible to death or possible severe

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[2]One of the experts explained in his affidavit that the police riot baton has traditionally been used as a barrier to assist in maintaining crowd control at demonstrations. He stated that thrust and jab procedures are taught to police officers as acceptable techniques for crowd control, but only for the purpose of repelling an imminent attack by an aggressive subject. Another expert stated that the short thrust is used to move people back in a crowd control situation and involves much less force than a full thrust, which is appropriate only in a situation where rioters are moving at great speed in an aggressive manner and there is an imminent risk of death or serious bodily harm.

> injury are the head, neck, throat, chest (in vicinity of heart) and arm pit. Unless deadly force is justified, officers should avoid striking any of the above described areas.
>
> Striking a suspect in the following areas is likely to cause temporary physical incapacity, but not death:
> * * * Solar plexus * * *.

(emphasis added). Police training documents on crowd control and civil disturbance also list the "heart area" as a possible fatal point of impact.

Chaplin submitted affidavits from four police officers from his department stating that Chaplin used the short thrust technique on Baker, a technique they were trained to use to control crowds and maintain the security perimeter. Each officer stated that, based upon his viewing of the videotape, in his opinion Chaplin's use of force was appropriate under the circumstances and consistent with their training.

In an appeal from an order denying summary judgment, we must determine if there are genuine issues of material fact in dispute and whether the trial court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). There are two legal questions which a court must answer when a government official pleads qualified immunity as an affirmative defense. According to the objective test set out by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), officials are protected by qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." First we must determine whether the plaintiff has alleged the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 231-32

(1991).[3] If the right allegedly violated was clearly established at the time of the official's actions, then we must determine whether "a reasonable officer could have believed [his actions] to be lawful, in light of clearly established law and the information [the officer] possessed." Anderson v. Creighton, 483 U.S. 635, 641 (1987).

The Supreme Court has provided guidance regarding the degree to which the law must be "clearly established." Mere statements of constitutional principles are too vague to offer guidance to police officers in the field; the plaintiff must show that the contours of the right were sufficiently clear that a reasonable official would understand that his actions violated that right. Anderson v. Creighton, 483 U.S. at 639-40. The very action in question need not have previously been held unlawful, but its unlawfulness must have been "apparent" in light of pre-existing law. Id.

In this case, Baker asserts that the law governing police use of force was clearly established at the time Chaplin struck her. She alleges that Chaplin used deadly force when he struck her. The Supreme Court set out the applicable general standard when it held that a police officer using unreasonable force violates the Fourth Amendment's protection against unreasonable search and seizure. Graham v. Connor, 490 U.S. 386 (1989).[4] According to Graham, determining whether

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[3]Discovery ordinarily should not be allowed until this threshold immunity question is resolved. Siegert, 500 U.S. at 231 (citing Harlow, 457 U.S. at 818). In this case, the defendant moved for summary judgment after some discovery had taken place.

[4]Prior to Graham courts had consistently found excessive use of force by police officers unconstitutional under the Fourteenth Amendment, rather than the Fourth Amendment. See, eg., Patzner v. Burkett, 779 F.2d 1363, 1371 (8th Cir. 1985); Bauer v. Norris, 713 F.2d 408, 411-12 (8th Cir. 1983); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973).

force used was objectively reasonable under the Fourth Amendment

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396.[5]

Many courts have found the law prohibiting excessive force to be clearly established for qualified immunity purposes. See, e.g., Street v. Parham, 929 F.2d 537, 540 (10th Cir. 1991) (holding that "[n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law"); Dixon v. Richer, 922 F.2d 1456, 1461 (10th Cir. 1991) (holding that the Supreme Court's Fourth Amendment standard of "objective reasonableness" for searches and seizures was set forth "long before" Graham v. Connor); Calamia v. City of New York, 879 F.2d 1025, 1036 (2d Cir. 1989) ("The right of an individual not to be subjected to excessive force has long been clearly established."); Williams-El v. Johnson, 872 F.2d 224 (8th Cir. 1989), cert. denied, 493 U.S. 871 (1989) (holding that a jailer is not entitled to qualified immunity from a § 1983 action because it

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[5]The Supreme Court has declined to reach the issue of whether qualified immunity is available as a defense to excessive force claims. Although the Court has applied the qualified immunity analysis to other Fourth Amendment claims, it expressly left open the question of whether qualified immunity applies to excessive force cases. Graham, 490 U.S. at 399 n.12. The plaintiff in this case has not argued that qualified immunity does not apply to this case at all; thus we are not faced with this issue.

is "clearly established" that it is unconstitutional for a correctional officer to beat a prisoner unnecessarily).

The specific standard for the use of deadly force was set forth in Tennessee v. Garner, 471 U.S. 1 (1985). Deadly force may not be used unless it is necessary to prevent escape of a suspect whom the officer has probable cause to believe poses a significant threat of death or serious physical injury to the officer or others. Id. This standard is also codified in a Minnesota statute governing the use of deadly force. The statute provides that:

> [T]he use of deadly force by a peace officer in the line of duty is justified only when necessary:
>
> (1) To protect the peace officer or another from apparent death or great bodily harm;
>
> (2) To effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force; or
>
> (3) To effect the arrest or capture, or prevent the escape, of a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.

Minn. Stat. 609.066 (1992). The contours of the standard are further delineated in the Minneapolis Police Department's training materials. The police department manual instructing officers on the use of the riot baton states that the chest area in

the vicinity of the heart should be avoided unless deadly force is justified.

However, Chaplin argues that language from a recent Supreme Court case, Hunter v. Bryant, __U.S. __, 112 S.Ct. 534 (1991), created a new standard for police use of force when the official is charged with protecting the life of the President. In Hunter the Court stated that the principle of accommodating reasonable error by public officials, so that they do not err on the side of caution for fear of being sued, is "nowhere more important than when the specter of Presidential assassination is raised." Id. at __, 112 S.Ct. at 537. Relying on this language alone, Chaplin asserts that Baker must point to an excessive force case dealing with "Presidential protection" to show that the law applicable to this incident was clearly established. Hunter, however, concerned a warrantless search, not a use of excessive force. The Supreme Court simply reasoned that the policies underlying the immunity doctrine were especially important when Secret Service agents investigated the author of a letter warning of an assassination plot against the President. Nothing in Hunter supports the conclusion that the Supreme Court created a new standard regarding the use of force by police officers when the security of the President is somehow involved.

Chaplin cites no cases holding that the law regarding either excessive force in general or the specific use of force alleged here, deadly force, was not clearly established at the time that he struck Baker. The use of excessive force was clearly prohibited by a general constitutional standard; the contours of the standard for the use of force alleged in this case were further established by statute, and these standards were incorporated in the training materials used by the Minneapolis police department. These sources taken together provide an unusually strong basis for finding that Baker has met her burden; we therefore hold that the law governing

Chaplin's actions was clearly established at the time that he acted.

We turn next to the inquiry into whether a reasonable officer could have believed Chaplin's actions to be lawful in light of clearly established law and the information Chaplin possessed. Anderson, 483 U.S. at 641.[6] For qualified immunity to apply to the officer's actions, the evidence must show that the actions were ones that "a reasonable officer could have believed lawful." Anderson, 483 U.S. at 646 n.6. The standard provides "ample protection to all but the plainly incompetent or those who knowingly violate the law"[7] and "gives ample room for mistaken judgments." Malley v. Briggs, 475 U.S. 335, 341, 343 (1986).

In this case, Baker alleges that the police officer unreasonably used excessive force against her. In assessing the reasonableness of a use of force, Graham held that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." 490 U.S. at 396. Both Graham and

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[6]The Court initially stated in Harlow that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [his or her] conduct." 457 U.S. at 818-19. In Anderson, however, the Court extended the reach of qualified immunity by holding that even if the law was clearly established at the time the officer acted, the officer should be permitted to argue on summary judgment that the officer reasonably believed his or her actions to be lawful. In Anderson, for example, the Court held that an officer conducting a warrantless search might have reasonably, but mistakenly, believed that the search was lawful. 483 U.S. at 641. If the officer's belief was reasonable, then he or she is entitled to qualified immunity. Id.

[7]The "knowingly violate" language should not be construed as injecting subjective intent, good will, or malice issues into the analysis. The Supreme Court has repeatedly stated that the analysis is an objective one. Anderson, 483 U.S. at 641 (defendant's "subjective beliefs about the [action] are irrelevant.").

Hunter call for courts to judge reasonableness with regard to all the facts and surrounding circumstances. Graham, 490 U.S. at 397; Hunter, ___ U.S. at ___, 112 S.Ct. at 537. The facts and circumstances in this case must be measured objectively by asking whether an objectively reasonable police officer would have believed that the force Chaplin used was lawful in light of the clearly established law and the information Chaplin possessed. Anderson, 483 U.S. at 641. An objectively reasonable police officer is one who is reasonably well trained. Malley, 475 U.S. at 345.

Although qualified immunity is "in part an entitlement not to be forced to litigate," when the law is clearly established, immunity from trial is appropriate only when the plaintiff has not demonstrated any genuine issues of material fact which must be resolved to determine whether the defendant's actions were reasonable under clearly established law.[8] The facts and

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[8]We recognize that the Supreme Court has "repeatedly stressed" the importance of resolving immunity questions at the earliest possible stage in litigation, ordinarily long before trial. Hunter v. Bryant, 112 S.Ct. 534, 537 (1991). In Mitchell v. Forsyth, 472 U.S. 511 (1985), the court stated:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions * * *.

Id. at 528 (emphasis added). The trial court followed this directive and determined that the legal norms allegedly violated by Chaplin were clearly established. Further, we note that the motion for summary judgment in this case was made after significant discovery had been conducted; thus, there was no need for the trial court to focus on the parties' bare allegations. By filing his motion after discovery, Chaplin waived any right to have his claim of immunity decided prior to

circumstances most relevant to determining the reasonableness of Chaplin's actions include Baker's behavior at the time she was struck, the amount of force Chaplin used, the location of Baker's injury, and the nature of the surrounding circumstances. In this case, these are the facts and circumstances which remain in dispute, and the legal question of the reasonableness of the officer's actions turns on the determination of such predicate facts. See Anderson, 483 U.S. at 655 n.10 (Stevens, J. dissenting). This court cannot decide as a matter of law whether the officer's actions in this case were reasonable without a finding of fact as to what those actions and the surrounding facts and circumstances were. In

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discovery. See Anderson, 483 U.S. at 646 n.6 (discovery may be necessary before motion for summary judgment on qualified immunity grounds can be resolved).

We do not by our opinion in this case mean to imply that trial courts may not make legal determinations on qualified immunity by considering only the allegations in the complaint and answer. As the Supreme Court stated in Mitchell:

> The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity * * * may represent the trial court's conclusion that even if the facts are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of the qualified immunity. In such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune. Alternatively, the trial judge may rule only that if the facts are as asserted by the plaintiff the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court's denial of summary judgment finally and conclusively determines the defendant's right not to stand trial on the plaintiff's allegations * * *.

472 U.S. at 527 (emphasis added).

Gainor v. Rogers, 973 F.2d 1379, 1385 (8th Cir. 1992), for example, the court of appeals held that if there are genuine issues of disputed fact surrounding the plaintiff's conduct and "the evidence [is] sufficient to create a genuine issue as to whether the defendant in fact committed the acts [citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)] * * * the defense of qualified immunity shielding the defendant from trial must be denied."

In the case at hand, Baker alleges that she was moving backward within police boundaries and complying with police orders when Chaplin lunged through a line of police officers to strike her in the sternum with a riot baton. Baker has produced an expert medical opinion, an affidavit from a witness who attended the demonstration, affidavits from two experts on the use of force by police officers, and Minneapolis police department training materials. Chaplin presented four affidavits from fellow police officers asserting that his use of force was reasonable.[9] Chaplin has produced no other evidence that he had an objectively reasonable purpose for using deadly force, or any other amount of force, on Baker. He has not asserted that he was effecting an arrest or had probable cause to suspect that Baker posed an imminent danger to himself or others. The videotape shows that Chaplin struck Baker while front-line officers stood by. A jury could conclude based on clearly established law, police department training materials, expert testimony and testimony regarding Baker's and Chaplin's actions that no objectively reasonable police officer would find Chaplin's use of force lawful. Baker has established the existence of genuine issues as to the

[9]Chaplin argues that if any single police officer would believe Chaplin's use of force was lawful, then he is entitled to summary judgment on qualified immunity. We cannot agree. If an immunity claim could be substantiated by submission of one affidavit from a fellow police officer claiming that the force used was reasonable, the result would be near absolute immunity.

underlying facts necessary to determine the reasonableness of the officer's actions as a matter of law. We therefore cannot conclude as a matter of law that Chaplin's actions were reasonable. Because applying the law in this case requires the establishment of predicate facts, we remand to the district court for trial.[10]

WAHL, Justice, took no part in the consideration or decision of this case.

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[10]Upon determination of the underlying factual issues by the finder of fact, the trial court may make another legal determination regarding the issue of the reasonableness of Chaplin's actions, and may find that Chaplin does enjoy qualified immunity from liability. Our holding is limited to our conclusion that Baker has submitted sufficient evidence to demonstrate genuine issues of material fact in dispute and evidence to support factual findings that would place the conduct at issue outside the protection of qualified immunity.

STATE OF MINNESOTA

IN COURT OF APPEALS

C7-92-1622

Hennepin County — Parker, Judge

District Court File #PI9122065

Janine Anne Baker,

Respondent,

Roderick J. Macpherson, III
30 North First Street,
Suite 300
Minneapolis, MN 55401

vs.

William Chaplin, individually and in his official capacity as a Minneapolis Police Officer,

Appellant,

Jerry W. Snider
Charles F. Webber
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN
55402-3901

City of Minneapolis,

Defendant.

Filed March 16, 1993
Office of Appellate Courts

SYLLABUS

1. A law enforcement officer is not entitled to summary judgment on his claim of qualified immunity to an action under 42 U.S.C. § 1983 if there is evidence that the officer violated a clearly established constitutional right.

2. A law enforcement officer, asserting official immunity under Minnesota law, is not entitled to summary judgment if there is evidence that he committed a willful wrong.

Affirmed.

Considered and decided by Forsberg, Presiding Judge, Parker, Judge, and Kalitowski, Judge.

OPINION

PARKER, Judge

Appellant William Chaplin, challenging the trial court's denial of his motion for summary judgment, claims he is entitled to both qualified and official immunity. We affirm.

FACTS

On September 27, 1990, President George Bush attended a function at the Hyatt Regency Hotel in downtown Minneapolis. Numerous social action groups and demonstrators participated in a rally outside the Hyatt to protest various policies of the Bush administration. Respondent Janine Baker attended the rally dressed in a men's business suit and wore a mask depicting the President's face. In addition, she carried a sign which read, "Q?? Why doesn't George sign U.N. Convention on Rights of Children?"

After listening to speeches made by representatives of the rally's sponsoring groups, Baker and the crowd congregated along Grant Street, where they expected the President's limousine to pass. Baker and the other demonstrators remained behind police barricades and stayed within the area the police had designated for them. A WCCO news crew filmed the demonstration.[1] The film depicts Baker standing at the front of the crowd at the corner of LaSalle Avenue and Grant Street. There were wooden police barricades directly in front of her, along Grant Street, and a second set of wooden barricades on her left side, along LaSalle Avenue.

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[1] A videotape of the incident is part of the trial court record and was viewed by the panel.

A line of Minneapolis police officers holding riot batons stood in a row immediately in front of the barricades. Behind this first line of police officers were Secret Service agents and other security personnel, including Minneapolis Police Department supervisors. Minneapolis Police Sergeant William Chaplin, an instructor in the use of the riot baton, was among the supervisors standing behind the first line of officers.

As Baker stood at the corner holding her sign, the police barricade in front of her fell. Police officers picked up the barricade and moved the crowd back. Baker and the other demonstrators complied with police instructions and moved back, away from the barricade. As Baker moved back, the barricade along LaSalle Avenue began to topple. From the WCCO video, it is unclear whether Baker pushed the barricade or whether Baker lost her balance and grabbed at the barricade for support. In any case, the LaSalle Avenue barricade fell to the ground. Neither Baker nor any other demonstrators attempted to move into the street or cross the police line.

When the LaSalle Avenue barricade fell, Sergeant Chaplin was walking behind the first line of officers, holding his riot stick. He then lunged forward and, with both hands on the baton, thrust his riot stick into Baker's chest. Chaplin appeared to use a full-arm swing when hitting Baker. Baker fell to the ground. The videotape unequivocally shows that Baker made no threatening or aggressive actions and was complying with police orders to move back, away from the barricade. Baker was standing still when Chaplin struck her in the middle of the chest, approximately one-third of the way down her sternum.

After Chaplin hit Baker, he turned his back to her and put on a pair of gloves. No attempt was made to arrest, reprimand, or remove her from the scene.

The Minneapolis Police Department Policy and Procedure Manual, as well as written materials used to train Minneapolis

police officers, contains explicit instructions regarding the use of riot batons. The policy manual specifically instructs police officers:

> A blow to certain parts of the human body can cause immediate death, or grievous injury that can lead to a permanent physical or mental incapacity or eventual death. Areas susceptible to death or possible severe injury are the * * * chest (in vicinity of the heart) * * *. Unless deadly force is justified, officers should avoid striking any of the above-described areas.

The manual further provides that police officers may use deadly force "only when necessary * * * [t]o protect themselves or others from apparent death or great bodily harm." Training materials used by the Minneapolis Police Department to instruct officers in the proper use of the riot baton contained the same caution.

John Peters and Lou Reiter, both experts in the field of police tactics and training, submitted affidavits in opposition to Chaplin's motion. Both experts agreed the force used by Chaplin was excessive and unwarranted. Peters characterized Chaplin's blow as "deadly force."

Four officers from the Minneapolis Police Department submitted affidavits in support of Chaplin's motion. Each stated that Chaplin, when hitting Baker, used the short thrust technique, a method of light "poking" with the riot baton, which is frequently used to control crowds. Their affidavits also stated their opinions that Chaplin's thrust was an appropriate use of force under the circumstances.

Baker began this action alleging civil rights violations under 42 U.S.C. § 1983 as well as common law claims of assault and battery. Sergeant Chaplin moved for summary judgment, contending that he was immune from suit under both federal and state law. The trial court rejected both his

qualified and official immunity claims and accordingly denied his summary judgment motion. Appeal is from this order.[2]

ISSUES

1. Is Sergeant William Chaplin entitled to qualified immunity from Baker's claim under 42 U.S.C. § 1983 as a matter of federal law?

2. Is Sergeant William Chaplin entitled to official immunity from Baker's state law claims as a matter of state law?

DISCUSSION

On appeal from summary judgment, the reviewing court must determine if there are genuine issues of material fact and whether the trial court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). The evidence must be viewed in a light most favorable to the nonmoving party. Clough v. Ertz, 442 N.W.2d 798, 801 (Minn. App. 1989).

I

The doctrine of qualified immunity to a section 1983 claim reflects the fundamental judgment that the public interest is not well served by imposing liability on public employees for the good-faith performance of their discretionary duties. Bartlett v. Fisher, 972 F.2d 911, 914 (8th Cir. 1992). The

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[2]Although a denial of summary judgment is normally not appealable, an order denying summary judgment may be appealed when a claim of immunity is asserted. Anderson v. City of Hopkins, 393 N.W.2d 363, 364 (Minn. 1986).

Supreme Court has adopted an objective test to determine when immunity applies. See Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738 (1982). Under this objective standard, officials are entitled to qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818, 102 S.Ct. at 2738. Qualified immunity is denied only when "it is obvious that no reasonably competent officer would have concluded" that the defendant's actions were legal. Malley v. Briggs, 475 U.S. 335, 342, 106 S.Ct. 1092, 1096 (1986).

Thus, a government official sued for his or her actions in the line of duty is entitled to immunity from suit if a reasonable official could have believed that his or her actions were lawful, in light of clearly established law and the information the official possessed. See Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987). The right the official is alleged to have violated, however, must be sufficiently clear so that a reasonable official would understand that the conduct violates that right. Id. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but, rather, in light of preexisting law the unlawfulness must be apparent. Id.

Chaplin maintains he is entitled to immunity because reasonable officers could disagree whether his actions constituted excessive force. For purposes of summary judgment, however, the trial court and this court are required to view the evidence in the light most favorable to the opponent of the motion. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981). Baker produced affidavits from two law enforcement specialists who indicated Chaplin used inappropriate force which no reasonable police officer would have considered warranted. One characterized Chaplin's blow as deadly force.

The Minneapolis Police Manual provides that deadly force may be used by officers "only when necessary to protect themselves or others from apparent death or great bodily harm." Likewise, it is well settled that use of deadly force to prevent the escape of all felony suspects is constitutionally unreasonable. Tennessee v. Garner, 471 U.S. 1, 11, 105 S.Ct. 1694, 1701 (1985). When the suspect poses no immediate threat to the officer or others, "the harm resulting from failing to apprehend him does not justify the use of deadly force." Id. Similarly, under Minnesota law, police officers are authorized to use deadly force only to protect police or another from apparent death or great bodily harm. Minn. Stat. § 609.066, subd. 2 (1990). Deadly force is also justified to arrest a person a police officer reasonably believes has committed or is about to commit a felony involving the use of deadly force. Id.

We conclude it is abundantly clear that, under the circumstances, the use of deadly force against Baker would be unlawful and violative of the Fourth Amendment. Baker's behavior was not a threat to the police, the President, or others. She did not try to enter the secured area or cross the police line. She simply moved back pursuant to police instruction and then stood quietly. We conclude that no reasonable, competent police officer could have believed that deadly force was justified in this situation.

The WCCO video, the police training materials, Baker's affidavit, and the affidavits of the law enforcement experts create genuine issues for trial. Accordingly, the trial court correctly denied Chaplin's summary judgment motion asserting qualified immunity as a matter of federal law.

II

Under Minnesota law, a public official is entitled to official immunity from state law claims when that official's

duties require the exercise of judgment or discretion. Johnson v. Morris, 453 N.W.2d 31, 41 (Minn. 1990). Generally, police officers are considered discretionary officers entitled to that immunity. Id. at 42. Minnesota's doctrine of official immunity, however, does not shield a police officer from suit if the officer commits a willful or malicious wrong. Rico v. State, 472 N.W.2d 100, 106-07 (Minn. 1991). Malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." Id. at 107 (quoting Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 462, 205 N.W. 630, 631 (1925)).

While the doctrine of official immunity is intended to protect bona fide law enforcement practices, it is not intended to shield police brutality. Elwood v. Rice County, 423 N.W.2d 671, 679 (Minn. 1988). Accordingly, liability will attach when a police officer intentionally commits an act which the officer, at the time of the act, has reason to believe is wrong. See Rico, 472 N.W.2d at 106-07. Our inquiry, therefore, is whether a genuine issue of material fact exists as to whether Chaplin's "actions could constitute a willful or malicious wrong." Id.

Baker has produced sufficient evidence from which a reasonable jury could conclude that Chaplin acted willfully and with malice when he struck Baker with his riot baton. She submitted the WCCO video, which illustrates the circumstances Chaplin confronted, as well as the apparent force of his blow. She also produced relevant sections of the Minneapolis Police Manual, which prohibits police officers from striking people in the chest, over the heart, with riot batons except in those cases where deadly force is justified. Baker further submitted police manual provisions indicating deadly force was not justified in this situation. Finally, Baker submitted the affidavits of two law enforcement specialists which indicate that no reasonably well-trained police officer

would have believed there was a need to strike her with the degree of force used by Chaplin.

We conclude Baker has produced facts which, if true, could allow a jury to conclude Chaplin acted willfully and with malice when he hit her. Consequently, the trial court correctly denied the summary judgment motion.

DECISION

Baker submitted sufficient evidence to create genuine issues for trial on whether appellant Chaplin's conduct violated her Fourth Amendment rights and constituted an intentional doing of a wrongful act without legal justification. Consequently, the trial court properly denied Chaplin's summary judgment motion in which he asserted immunity from suit under both qualified and official immunity doctrines.

Affirmed.

s/ Edward Parker, Judge
Mar. 10, 1993

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Janine Anne Baker,

Plaintiff,

vs.

William Chaplin, individually and in his official capacity as a Minneapolis Police Officer, and City of Minneapolis,

Defendants.

ORDER

File No. PI 91-22065

The above-entitled matter came on for hearing before the Honorable Lucy A. Wieland, Judge of District Court, on April 22, 1992, on Defendant Chaplin's motion for summary judgment.

Roderick J. MacPherson, Esq., appeared on behalf of Plaintiff.

Charles Webber, Esq., appeared on behalf of Defendant Chaplin.

Upon all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED,

1. That Defendants' motion for summary judgment is hereby denied in its entirety.

2. That the following memorandum is hereby made an official part of this Order.

IT IS SO ORDERED.

Dated: July 7, 1992

BY THE COURT:

S/S

Lucy A. Wieland
Judge of District Court

MEMORANDUM

Plaintiff brought a federal claim against Defendant Chaplin under 42 U.S.C. Sec. 1983, alleging that Chaplin used excessive force in restraining Plaintiff; a second federal claim, alleging that Chaplin interfered with Plaintiff's rights to freedom of speech and assembly; and state claims for negligence, battery, and assault.

STATEMENT OF FACTS

The following are the facts in the light most favorable to Plaintiff, the non-moving party (the Court relies on the WCCO videotape of the incident unless otherwise noted):

When President George Bush spoke on September 27, 1990 at the Hyatt Regency Hotel, a number of local citizens attended a rally outside the hotel to express their opposition to the policies of his administration.

Plaintiff attended the rally to express her opposition to President Bush's failure to ratify the United Nations Convention on the Rights of Children. Plaintiff dressed in a business suit and wore a mask of the President's face. She carried a sign which read, "Q?? Why doesn't George sign U.N. Convention on Rights of Children?"

Plaintiff and her husband arrived on Nicollet Mall at the entrance to the hotel shortly after the rally began. After listening to speeches made by the rally's sponsoring groups, Plaintiff moved with the crowd around the corner to the Grant Street side of the building where the demonstrators believed the President's limousine would pass. Plaintiff aff. at 6. The group appeared to be peaceful. Plaintiff and the other demonstrators remained behind the police barriers and stayed within the area the police had designated for them. Id. at 7.

A decoy limousine was used to attract the demonstrators' attention while the President apparently left the hotel by

another exit and thus never came close to the area where the demonstrators had gathered.

Plaintiff stood in front of the area the police had designated for demonstrators at the corner of LaSalle Avenue and Grant Street. There were wooden police barricades directly in front of her (along Grant Street) and a second set of wooden barricades on her left side (along LaSalle Avenue). In addition, there were at least two police vehicles parked directly adjacent to the LaSalle Avenue barricades.

While the demonstrators stood behind the Grant Street barriers there was only one incident in which a demonstrator attempted to cross the police line and move into the street. Chaplin and the other officers handled the situation by holding their riot batons horizontally to push him back behind the lines. None of the officers struck him with a baton. This incident took place some distance away from where Plaintiff stood and occurred several minutes before Chaplin hit her. Id. at 10.

A line of Minneapolis Police Officers holding riot batons stood in a row immediately in front of the barricades. Behind this first line of police officers there were more Minneapolis police officers, Secret Service agents, and other security personnel, including Minneapolis Police Department supervisors. Chaplin was among the supervisors standing behind the first line of officers--there was a row of police officers between Chaplin and the barricades.

As Plaintiff stood at the corner holding her sign, the barricade in front of her fell over. Minneapolis Police officers picked up the barricade and moved the crowd a few steps back. Plaintiff and the other demonstrators complied with the police officers' directions and backed up, though there was little room for them to move backwards.

As Plaintiff tried to move backwards, the barricade along LaSalle Avenue fell over. The barricade was unstable and apparently had toppled over several times earlier that day.

Zemke aff. at 8. Plaintiff claims that she lost her balance and bumped into the barricade and that others in the crowd also were pushed against it. Plaintiff aff. at 15. At no time did Plaintiff or any other demonstrator attempt to move into the street. The videotape shows that the protesters complied with the directions of the police officers and moved back from the barricade, so the police could set it up again.

Chaplin alleges that, at the time of the incident, he thought that President Bush's motorcade was due in the area. Chaplin aff. at 6. He states that, as the officers tried to move the crowd back, Plaintiff pushed over a barricade. Id. at 10.

When the barricade fell over, Chaplin was walking behind the first line of officers, holding his riot stick. He instantly lunged forward, through the other officers. He swung his riot stick like a battering ram and struck Plaintiff in the middle of the chest, close to her heart. Plaintiff aff. at 19. Based on the videotape, it appears as though Chaplin hit Plaintiff with full force. Plaintiff was standing still when Chaplin hit her.

Chaplin's blow bruised Plaintiff's sternum, damaged cartilage, and caused soft tissue injuries to Plaintiff's neck, chest, and spine. Plaintiff aff. at 20-21 & attached exhibits.

Chaplin did not attempt to speak or communicate with Plaintiff before he attacked her. He did not give her any directions or warning. Chaplin did not arrest Plaintiff, or make any attempt to do so, either before or after he struck her. Plaintiff did not appear to attack or threaten Chaplin or anyone else. No other demonstrator threatened Chaplin.

I. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate where it has been demonstrated that there is no issue as to any material fact and that either party is entitled to summary judgment as a matter of law. Minn. R. Civ. P. 56.03.

Summary judgment is an appropriate means to decide qualified immunity issues in civil rights actions against public officials. Reuter v. City of New Hope, 449 N.W.2d 745, 749 (Minn. Ct. App.), rev. denied, (Minn. 1990). Qualified immunity is a question of law for the court. Hunter v. Bryant, 112 S. Ct. 534, 537 (1991).

II. PLAINTIFF'S FEDERAL CLAIMS.

In her Complaint, Plaintiff asserts a federal claim against Chaplin under 42 U.S.C. Sec. 1983 in both his individual and his official capacities.

A. OFFICIAL CAPACITY.

Chaplin is a police officer employed by the City of Minneapolis. He is not a state employee. Thus he is not immune from suit in his official capacity. See Will v. Michigan Dept. of State Police, 109 S. Ct. 2304, 2310 n.7 (1989).

B. INDIVIDUAL CAPACITY.

A civil lawsuit for damages may be the only means to vindicate constitutional rights. Anderson v. Creighton, 483 U.S. 635, 638 (1987). However, there is a sociétal interest in providing public officials with immunity in some circumstances so that they will not be inhibited in the performance of their duties. Id. This is why the United States Supreme Court has applied the doctrine of qualified immunity to federal civil rights claims even though Section 1983 does not provide for any immunities. Malley v. Briggs, 475 U.S. 335, 342 (1986).

In Malley v. Briggs, 475 U.S. 335 (1986), the United States Supreme Court set the standard for whether a police officer who is sued in his individual capacity may be held personally liable for an alleged wrongful action. A police

officer is not immune from suit if "on an objective basis, it is obvious that no reasonably competent officer would have concluded [that the officer's conduct was proper]." Id. at 341. If reasonable, competent officers could disagree about whether the defendant's actions were proper, the defendant is entitled to summary judgment. Id.

Police officers do not have absolute immunity from suit. Malley, 475 U.S. at 342. Qualified immunity protects officers who make honest mistakes in judgment--it does not protect "the plainly incompetent or those who knowingly violate the law." Hunter v. Bryant, 112 S. Ct. 534, 537 (1991).

The doctrine of qualified immunity shields Defendant Chaplin from suit if "a reasonable officer could have believed [Chaplin's alleged actions] to be lawful, in light of clearly established law and the information [Chaplin] possessed." Anderson, 483 U.S. at 641.

Chaplin is immune from suit unless his alleged conduct violated a "clearly established" constitutional right. Id. at 640. This means that the "contours of the right must be sufficiently clear that a reasonable [police officer] would understand that what he is doing violates that right." Id.

A Section 1983 claim may be based upon the use of excessive force by a police officer.[1] Johnson v. Morris, 453 N.W.2d 31, 36 (Minn. 1990) (citing Graham v. Connor, 109 S. Ct. 1865 (1989)). "A claim of excessive force is to be reviewed for its reasonableness as a seizure of a person under the Fourth Amendment." Id. Fourth Amendment reasonableness depends upon "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham v. Connor, 109 S. Ct. 1865, 1872 (1989).

For the purposes of qualified immunity, the question is whether it was clearly established, at the time of the incident, that the circumstances with which Chaplin was confronted did not warrant the amount of force he used. Anderson, 483 U.S. at 640-41. This requirement recognizes that police officers may sometimes make mistakes which are reasonable in light of the surrounding circumstances and that those officers should not be personally liable. Id.

The issue of whether it was reasonable for Chaplin to use the degree of force he used on Baker must be evaluated objectively. This Court must answer the objective question of whether a reasonable, competent officer could have believed that the type and amount of force used by Chaplin was reasonable, given the information Chaplin possessed at the time of the incident. Chaplin's subjective beliefs are irrelevant. Anderson, 483 U.S. at 641.

Minnesota Statute Section 609.066 defines "deadly force" as the force which one uses "with the purpose of causing, or which [one] should reasonably know creates a substantial risk of causing death or great bodily harm." Minn. Stat. Sec. 609.066, subd. 1 (1990). A police officer is authorized to use deadly force in the line of duty only if it is necessary to "protect the peace officer or another from apparent death or great bodily harm." Id. subd. 2. (The other exceptions are not relevant in this case.)

Minneapolis Police Department Regulation 5-302 limiting the use of deadly force mirrors Section 609.066. Regulation 5-314 provides for the proper use of a riot baton:

> The use of batons or truncheon is force, and, therefore must be legally justifiable and within Department guidelines.
>
> Officers are expected to be aware of the fact that a blow to certain parts of the human body can cause immediate death, or grievous injury that can lead to a

> permanent physical or mental incapacity or eventual death. Areas susceptible to death or possible severe injury are the head, neck, throat, chest (in the vicinity of the heart) and arm pit. Unless deadly force is justified, officers should avoid striking any of the above described areas.

Mpls. Police Dep't Reg. 5-314. The Minneapolis Police Department's regulations and training materials also reflect the Department's policy that a baton may not be used to strike someone near the heart area unless deadly force is authorized. See A. Hart & J. Laux, Crowd Control Formations 8-9 (Jan. 14, 1985) (providing that the heart area is a fatal point of impact and that "[o]fficers should be equipped with the riot baton only when they are well trained in its use").

Chaplin states that he used a "short thrust" maneuver on Plaintiff. He alleges that officers are taught to use this technique when crowds pose a threat to others' safety. Chaplin aff. at 11. He asserts that his use of a short thrust maneuver was consistent with training he received in controlling crowds and demonstrators. Id. at 13. He further states that he instructs other officers in crowd control techniques and that he teaches them to use a short thrust technique because it "restrains the demonstrator while doing the least amount of injury to the demonstrator." Id. at 14.

John Peters, an expert in police training and practices, acts as a consultant and trainer for a large number of law enforcement agencies nationwide and trains police departments in the proper use of the riot baton. Peters aff. at 1-5, 11. Peters reviewed the WCCO videotape, the affidavits of Officers Chaplin, Haynes, Thomas, and Dodge, and the Minneapolis Police Department's policies and training materials. Id. at 8-10. Based upon his review and his experience, Peters concluded that the blow Chaplin used on Plaintiff constituted deadly force. Peters states that the type of

blow Chaplin used is not the short thrust maneuver police officers are taught because "the short thrust is not used with the degree of force which [Chaplin] used when he hit [Plaintiff]. Id. at 14. Peters also states that "police officers are specifically taught not to hit people in the chest area because of the possibility of causing death or serious injury." Id. at 15. He notes that the Minneapolis Police Department's regulations and training materials "are consistent with the generally accepted standards and practices in the law enforcement profession." Id.

Peters concluded:

> A blow to the chest with a riot baton (such as the blow Sgt. Chaplin gave to Ms. Baker) is only appropriate in a riot situation where rioters are moving with great speed in an aggressive manner and where there is an imminent risk of death or serious bodily harm.
>
> At the time Sgt. Chaplin hit Ms. Baker, there was no riot situation and no reasonable, objective police officer could have believed Ms. Baker posed a threat to the officers' life or safety.

Id. at 16. Peters also notes that even if Plaintiff had pushed down the barricade and the security perimeter had been breached, there is no basis for any reasonable police officer to hit Plaintiff in the chest with the degree of force Chaplin used. Id. at 20-22.

Lou Reiter, another expert in law enforcement training and technique, agrees with Peters' conclusion. He states, "The thrust and jab procedures . . . are acceptable baton techniques for crowd control, but only for the purpose of repelling an

imminent attack by an aggressive subject." Reiter aff. at 8. He concludes:

> In my opinion, there was absolutely no justification for Sgt. Chaplin's use of any force, let alone the dangerous full thrust assault which he made with his riot baton, given the circumstances that existed at the time he struck Ms. Baker. . . . In my professional opinion, Sgt. Chaplin's actions were totally unreasonable and unwarranted. In my professional opinion, any reasonably trained experienced officer who viewed the videotape and other evidence in an objective manner would come to the same conclusion as I have just reached.

Id. at 9-10.

Since Chaplin trains other officers in the use of a riot baton, he should know that officers are prohibited from striking anyone in the heart area with a baton unless the use of deadly force is justified. Chaplin struck Plaintiff in the chest (on her sternum near her heart) with a riot baton. He did not tap her with it to prod her into moving backwards. Instead, he swung it hard, with full force, like a battering ram. Chaplin's use of the baton in this manner, to this area of Plaintiff's chest, constitutes deadly force under Minnesota Statute Section 609.066 and Minneapolis Police Department Regulation 5-302. This Court finds that any reasonable, competent officer would know that swinging a baton in this manner is deadly force. Therefore, any reasonable officer would know that this use of a baton is prohibited unless the use of deadly force is justified. Unless an objective, reasonable officer, faced with the circumstances surrounding this incident, could believe that Plaintiff threatened him or others with death or great bodily harm, qualified immunity is not appropriate.

The WCCO videotape provides a record of the circumstances surrounding this incident. The videotape shows that the officers stationed in the street, alongside the barricades, instructed Plaintiff and the other demonstrators to move a couple of steps backwards. The videotape shows that the demonstrators complied and neither Plaintiff nor anyone near her moved or attempted to move toward the street. Plaintiff and the other demonstrators were clearly complying peacefully with the officers' instructions.

At some point, the barricade to Plaintiffs' left (along LaSalle Avenue) fell over. Chaplin states that Plaintiff pushed the barricade over--Plaintiff denies it. It cannot be determined from the videotape whether Plaintiff intentionally pushed it, Plaintiff accidentally bumped it, or some other person pushed or bumped it. Since this factual dispute as to whether Plaintiff pushed the barricade cannot be resolved at this time, this Court will assume that a reasonable officer in Chaplin's shoes could have believed that Plaintiff pushed it over intentionally.

Chaplin states that he struck Plaintiff "solely in order to prevent a breach of the Presidential security perimeter." Chaplin aff. at 11. The only basis he gives for his decision to strike Plaintiff is that she pushed over the barricade to her left. Id. at 10. Chaplin does not allege that Plaintiff moved or attempted to move into the street. He does not maintain that she made a threat or made any threatening gestures. Chaplin does not provide any objective basis in support of his conclusion that Plaintiff had attempted or would attempt to breach the security perimeter.

In fact, the videotape clearly shows that, when the barricade fell over, Plaintiff simply stood in place. Neither Plaintiff nor any other demonstrator moved towards the street. Under the circumstances, no reasonable officer in Chaplin's shoes could believe that Plaintiff was attempting to move forward across the security perimeter.

Sergeant Dodge, Captain Haynes, and Sergeant Thomas have provided affidavits stating their conclusion that Chaplin's actions were reasonable. These affidavits are not persuasive. These officers do not provide any reasons for their conclusions and do not point to any actions of Plaintiff in support of their conclusions, other than that she pushed over the barricade. None of these officers mentioned the Minneapolis Police Department's regulations on the use of deadly force or the use of riot batons. Thus, this Court cannot determine whether these officers are competent.

Even if there was an objective basis for a reasonable officer in Chaplin's shoes to believe that plaintiff pushed over the barricade with the intention of moving into the street, no competent, reasonable officer could believe that Plaintiff's actions could constitute an immediate threat of death or great bodily harm to an officer or another.

Based on a close review of the record, and considering the applicable standard of review, this court concludes that Chaplin is not qualifiedly immune from suit on Plaintiff's federal claims.

III. PLAINTIFF'S STATE LAW CLAIMS.

Plaintiff's Complaint asserts state law claims against Chaplin for negligence, assault, and battery.

"[U]nder Minnesota law a public official is entitled to official immunity from state law claims when that official is charged by law with duties that require the exercise of judgment or discretion." Johnson, 453 N.W.2d at 41. Generally, police officers are entitled to discretionary immunity. Id. at 42. Minnesota's doctrine of official immunity is similar to, though distinct from, the federal doctrine of qualified immunity. Rico v. State, 472 N.W.2d 100, 108 (Minn. 1991).

Minnesota's doctrine of official immunity does not shield a police officer from suit if the officer "commits a willful or malicious wrong." Id. at 107. The officer is liable when he intentionally commits an act he then has reason to believe is wrong. Id. The issue of malice is usually an issue of fact for the jury to decide. Johnson, 453 N.W.2d at 42.

Chaplin's attempt to liken the instant case to Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988), is not persuasive. In Elwood, the deputies approached Clifford Elwood in response to an emergency call. When the deputies arrived, they knew that Elwood's ex-wife had obtained a temporary order for protection against Clifford, that Clifford had threatened her life earlier that week, that Clifford carried a gun in his car, and that he had threatened his ex-wife with the gun again moments before the police were called. They also knew he was possibly threatening to kill himself.

In response to this emergency situation, the deputies entered the house Clifford was calling from, a deputy shoved Clifford's father against a wall and told him to shut up, told Clifford's mother to sit down and stay, and approached Clifford. While the deputy was speaking to Clifford, Clifford took a step and the deputy allegedly pushed him back.

The Minnesota Supreme Court held that the deputies were immune from suit on the state claims because they exercised judgment in momentarily restraining the plaintiffs in light of the emergency situation and their knowledge of the facts. Id. at 678-79.

The facts in the instant case do not resemble those in Elwood. Chaplin was not responding to an emergency situation and he did not have knowledge of any facts which could reasonably cause him to believe Plaintiff was dangerous. In addition, Chaplin did not momentarily restrain Plaintiff by pushing her backwards or instructing her to stand back. Instead, without warning, he used full force and struck her chest with a riot baton.

Plaintiff has produced facts which, if true, establish that Chaplin acted willfully and with malice when he hit Plaintiff. Chaplin's actions violated provisions of Minnesota Statutes and the Minneapolis Police Department Regulations which prohibit police officers from striking people in the chest with batons unless the use of deadly force is authorized. Under the circumstances existing at the time, Chaplin could not reasonably believe that he was authorized to use the degree of force he used against Plaintiff.

Since Plaintiff has established that there is a material issue of fact as to whether Chaplin acted willfully and with malice, summary judgment is not appropriate on Plaintiff's state law claims.

L. A. W.

---

[1]Plaintiff has brought a second federal claim, alleging that Chaplin interfered with her First Amendment rights to freedom of speech and assembly. This Court will not decide any issues relative to Plaintiff's second federal claim since neither party briefed any issues regarding that claim. (Chaplin merely mentions the First Amendment claim in a footnote to his memo, citing two cases which do not support his comments.)

MILLARD

STATE OF MI...ESOTA

Supreme Court

Court Of Appeals

Janine Anne Baker,
Respondent,
vs
William Chaplin, individually and in his official capacity as a Minneapolis Police Officer, petitioner,
Appellant,
City of Minneapolis,
Defendant.

JUDGMENT

C7-92-1622
Appellate Court Case Number

9122065
Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order *of the Court below, herein appealed from, to wit, of the* District *Court within and for the County of* Hennepin *be and the same hereby is*

affirmed

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herewith transmitted and made part of the remittitur.

And it is further determined and adjudged that Respondent *herein, do have and recover of* Appellant

herein the sum and amount of

Six hundred six and 68/100..... Dollars, ($ 606.68)

as costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed: FOR THE COURT ...ust 26, 1994 *Attest:* Frederick K. Grittner
Dated
Clerk of the Appellate Courts

By: _____
Deputy/Assistant Clerk

Statement For Judgment

Statutory Costs	$ 300.00	Trial Court Fee	$ 0.00	Transcript	$ 0.00
Printer	$ 306.68	Appellate Court Fee	$ 0.00	Appeal Bond	$ 0.00
Postage and Express	$ 0.00				
Other _____			$ 0.00	Total	$ 606.68

Satisfaction of Judgment filed: _____
Dated

Therefore the above judgment is duly satisfied in full and discharged of record

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: _____
Deputy/Assistant Clerk

Form APL 200

STATE OF MI[illegible]IESOTA

☐ Supreme Court
☐ Court Of Appeals

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgement in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the State Capitol,

in the City of St. Paul 8-26-94
Dated

Frederick K. Grittner
Clerk of the Appellate Courts

By _____
Deputy/Assistant Clerk

STATE OF MINNESOTA, COUNTY OF HENNEPIN
I hereby certify that the [illegible] page document to be a true and correct copy of the original on file and of record in my office.

District Court Administrator

By _____ Deputy

Case Type: Other Civil

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Janine Anne Baker, File No. 91-22065

Plaintiff,

v. **AFFIDAVIT OF WILLIAM CHAPLIN**

William Chaplin, individually
and in his official capacity
as a Minneapolis Police
Officer, and City of
Minneapolis,

Defendants.

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

1. I am a Sergeant with the Minneapolis Police Department, a supervisor in the police department's Emergency Response Unit, and the defendant in the above matter. I make this affidavit in support of my motion for summary judgment. Because I was present at the scene of the events that the plaintiff describes in her complaint, I have personal knowledge of the facts stated in this affidavit.

2. On September 27, 1990, I was on duty at a public demonstration against the policies of the administration of

President George Bush. The rally was held primarily in front of the Hyatt Regency Hotel in downtown Minneapolis.

3. The Minneapolis Police Department expected the rally to be large and assigned numerous officers, including me, to monitor the rally and control the crowds, if necessary.

4. Prior to the President's arrival, I and other officers attended various training exercises relating to strategy and tactics for protecting President Bush.

5. One demonstrator was at the rally dressed as President Bush. The demonstrator had donned a full-face rubber mask resembling the President and was dressed in a business suit. This person demonstrated in the street for a time before I and other police officers moved the masked demonstrator and the rest of the crowd behind security barricades that the City had erected for the President's and the crowd's safety.

6. At the time we restrained the demonstrators behind the security barricades, President Bush's motorcade was due in the area at any moment.

7. Several protestors pushed the barricades aside and rushed into the street. I and other officers moved them back behind the barricades and re-established the security line.

8. The demeanor of the protestors further deteriorated to such an extent that the Secret Service determined that a security risk existed.

9. At one point in the demonstration, the masked demonstrator and others near that demonstrator began moving toward the street and the security barricades.

10. As I and other officers tried to move the surging crowd back, the masked demonstrator pushed over one of the security barricades.

11. I struck the masked demonstrator once in the chest with my riot stick in a maneuver called "short thrust," which is a technique that officers are taught to use when crowd members pose a threat to others' safety. I used the maneuver

solely in order to prevent a breach of the Presidential security perimeter, which was my duty that day.

12. Because the masked demonstrator posed no further threat to anyone's safety after my use of the short thrust, I did not strike the demonstrator again.

13. My use of the short thrust was consistent with the training I and other police officers received in controlling disruptive crowds and demonstrators who try to breach police lines, and specifically with the training I and other police officers received in connection with President Bush's visit.

14. I train other officers in crowd control techniques and instruct them to deal with demonstrators who try to breach police lines by using the short thrust technique because such that technique restrains the demonstrator while doing the least amount of injury to the demonstrator.

S/S
William Chaplin

Subscribed and sworn to before me this 25th day of March, 1991.

S/ Mary R. Shaw
Notary Public

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

(2)

No. 94-575

In The

Supreme Court of the United States

October Term, 1994

WILLIAM CHAPLIN,

Petitioner,

v.

JANINE ANNE BAKER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION

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4 pp

QUESTIONS PRESENTED

Respondent strongly disagrees with the Petitioner's statement of the issues presented by this case. She believes the questions actually presented are:

1) Whether the contours of the law concerning a police officer's use of excessive force were clearly established when Sgt. Chaplin hit Ms. Baker with his riot baton.

2) Whether the presence of disputed predicate facts necessary for applying the objective reasonableness standard for qualified immunity requires denial of summary judgment.

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STATEMENT OF CASE

On September 27, 1990, Sgt. William Chaplin smashed Janine Anne Baker in the middle of her chest, just over her heart, with his riot baton. The incident was recorded by a local television news crew.[1] While the parties agree that Chaplin hit Baker, significant facts underlying this lawsuit are disputed by the parties, including the facts concerning the circumstances that existed at the time he hit her. Petitioner's version of the events inaccurately summarizes the incident and fails to identify the conflicting versions of the material facts of this case.

President George Bush came to Minneapolis on September 27, 1990 to speak at a political fund-raiser. A number of Twin Cities social action groups organized a rally outside the Hyatt Hotel where the fund-raiser was being held to provide a forum where the public could express opposition to the President's policies. Pet. App. 3a.[2]

Janine (Annie) Baker attended the rally to express her opposition to the President's failure to ratify the United Nations Convention on the Rights of Children. She used humor to convey her message by dressing in a business suit and wearing a mask of President Bush's face. Resp. App. 1a, 2a.

---

[1] The videotape is included as Respondent's Appendix 1a. A copy of the videotape has been lodged separately with the Clerk of the Supreme Court of the United States.

[2] References to "Pet. App." refer to Petitioner's Appendix attached to his petition. References to "Resp. App." refer to Respondent's Appendix attached to this Brief in Opposition.

Contrary to the Petitioner's version of the facts, Baker did not demonstrate in the streets until the police moved her back behind barriers. Baker and the other persons attending the rally initially gathered in front of the hotel for speeches. They were allowed to use Nicollet Avenue, which had been blocked off by the police for this purpose. When the speeches ended, the group moved peacefully around the corner to the Grant Street side of the building. Baker remained behind the police barriers and stayed within the area the police had designated for them at all times. Pet. App. 3a

Baker and other persons attending the rally stood on the Nicollet Mall during the speeches and later walked down the Mall to get to Grant Street. (The WCCO videotape shows Baker dancing around a drummer.) This occurred on the Nicollet Mall when the crowd was walking to Grant Street. Once the crowd reached Grant Street, Baker and the other participants remained on the sidewalk, behind the police barricades. Resp. App. 1a, 3a, 4a.

Chaplin also misstates the facts in the record when he argues that he was defending the life of the President. It is undisputed that President Bush was not in the area of the demonstration when Chaplin hit Baker. President Bush had left the hotel earlier by another exit and was never in the area where Baker and the others had gathered. Resp. App. 6a, 9a.

Baker stood in the front of the crowd on the corner of LaSalle Avenue and Grant Street in the area the police had designated for demonstrators to stand. There were wooden police barricades directly in front of her (along Grant Street) and a second set of wooden barricades on

her left (along LaSalle Avenue). In addition, there were at least two police vehicles parked directly adjacent to the LaSalle Avenue barricade, forming a second barrier between the demonstrators and the street. Pet. App. 3a, Resp. App. 1a.

A line of Minneapolis police officers holding riot batons stood immediately behind the barricades. Behind this first line of police officers there were Secret Service Agents, other security personnel, and more Minneapolis Police Officers, including supervisors. Among those supervisors was Petitioner Chaplin. Resp. App. 1a.

During the time the demonstrators were behind the Grant Street barriers, there was only one incident in which any demonstrator attempted to cross the police line and go into the street. This incident took place in the middle of the block some distance away from where Baker stood and occurred several minutes before Chaplin hit Baker. Resp. App. 1a, 4a. The videotape shows a man momentarily break through the police line. Chaplin and other officers quickly pushed him back behind the lines holding their riot batons horizontally to push him. None of the officers used a thrust maneuver to strike him. Resp. App. 1a. This person had no connection with Ms. Baker.

Later, as Baker stood at the corner holding her sign, the Grant Street barricade in front of her was jostled by the crowd and fell over. Minneapolis police officers picked up the barricade and moved the crowd back, away from the curb. Baker and the others in the crowd backed up to comply with the police officers' directions, even though there was little room for them to move backwards. Pet. App. 3a, Resp. App. 1a, 5a.

As Baker tried to move backwards she used the LaSalle Avenue barricade to balance herself. At the same time others in the crowd were pushed against it causing the barricade to fall over. Pet. App. 3a and 4a, Resp. App. 1a. Neither Baker nor the other demonstrators attempted to move past the police line and into the street when the barricade fell over. The crowd was neither agitated nor out of control. They complied with the directions of the police officers and were moving backwards, away from the barricade, so the police could set it up again. Resp. App. 1a, 5a.

At this time, Chaplin was walking behind the first line of officers, holding his riot baton. When the barricade fell over he instantly singled out Baker and lunged forward, past the front line officers. He swung his riot stick like a battering ram with both hands, and with full force brutally jabbed Baker in the middle of the chest. Baker was standing still when Chaplin hit her. Resp. App. 1a.

Chaplin did not say a word to Baker before he attacked her. He did not give her any directions or warning. Baker did not attack or threaten Chaplin. Chaplin did not arrest Baker, or make any attempt to do so. Instead, as the videotape shows, he turned his back on Baker after the blow and put on a pair of black leather gloves. Resp. App. 1a.

Chaplin's blow struck Baker in the middle of her chest, severely bruising her sternum. The sternum is located directly over the heart. Pet. App. 4a, Resp. App. 1a. Baker suffered serious physical and emotional injuries as a result of Chaplin's attack. Resp. App. 6a, 7a.[3]

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[3] For reasons of economy, Respondent has omitted the exhibits attached to and referred to in her affidavit.

The Minneapolis Police Department Policy and Procedure Manual, as well as training materials used by the Department, contain explicit instructions regarding the use of riot batons. The policy manual specifically instructs police officers:

> 5-304 *BATON OR RIOT TRUNCHEON*
>
> Officers are expected to be aware of the fact that a blow to certain parts of the human body can cause immediate death, or grievous injury that can lead to a permanent physical or mental incapacity or eventual death. Areas susceptable (sic) to death or possible severe injury are the . . . chest (in the vicinity of the heart). . . . Unless deadly force is justified, officers should avoid striking any of the above described areas.

Pet. App. 5a, 6a. The Manual further provides that police officers may use deadly force "only when necessary . . . to protect themselves or others from apparent death or great bodily harm." Pet. App. 5a, 9a.

Training materials used by the Minneapolis Police Department to instruct officers in the proper use of the riot baton contain the same caution. Pet. App. 5a, 6a. Sgt. Chaplin was an instructor in the use of the riot baton and therefore familiar with the training materials and the policy manual provisions concerning the use of the riot baton. Pet. App. 45a.

Baker filed a complaint regarding Chaplin's conduct with the Internal Affairs Unit of the Minneapolis Police Department. The Petitioner has misrepresented the outcome of her complaint to this Court. The complaint was sustained by the Department. The Petitioner's statement that the Internal Affairs Unit dismissed the complaint is

inaccurate and misleading. While an Internal Affairs Unit investigator recommended that no action be taken against Chaplin, the complaint was never dismissed. Police Chief John Laux rejected this recommendation, upheld the complaint and suspended Chaplin. Resp. App. 10a.[4]

Chaplin filed a motion with the trial court seeking summary judgment on his defense of qualified immunity. The motion was denied. The Minnesota Court of Appeals and the Minnesota Supreme Court, the state court of last resort in Minnesota, both unanimoulsy affirmed the decision of the trial court.

REASONS FOR DENYING CERTIORARI

Review by certiorari should only be granted where there are "special and significant reasons" for reviewing a decision made by a lower court. The Rules of this Court provide the standards for determining whether a request for certiorari should be granted. A petition for certiorari should only be granted:

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of the decision of another state court of last resort or of a United States court of appeals.

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[4] The recommendation of the IAU investigating officer is not surprising in light of the poor record of the Minneapolis Police Department Internal Affairs Unit concerning investigation and discipline of Minneapolis police officers. *Mische v. Sauro*, U.S. District Court, District of Minnesota, File No. CV 3-94-217.

> (c) When a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court.

Rules of the Supreme Court of the United States, Rule 10.1.

The law of qualified immunity contains a two part test: Whether the law concerning the police officers actions was "clearly established" and whether an objectively reasonable police officer would have known his/her conduct was constitutionally impermissible. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 477 U.S. 317 (1982). The Minnesota Supreme Court applied both prongs of the *Anderson* test and concluded that granting summary judgment was not warranted. It determined that the law concerning the use of force by police officers was clearly established. It also determined that material predicate facts necessary to decide the objective reasonableness standard were in dispute.

The Petitioner now argues that both aspects of its decision are inconsistent with the decisions of the Supreme Court of the United States and are also in conflict with decisions of the U.S. courts of appeal. The following sections of this brief will demonstrate that the Petitioner is incorrect. The decision of the Minnesota Supreme Court is consistent with the decisions of this Court and the courts of appeal concerning both the clearly established law and objective reasonableness elements of the qualified immunity standard.

THE LAW CONCERNING THE USE OF FORCE WAS WELL ESTABLISHED.

The first element of the qualified immunity standard focuses on the constitutional right the plaintiff claims was violated. This Court has held that the right which the plaintiff seeks to enforce must have been "clearly established" at the time the defendant acted. *Anderson v. Creighton*, 483 U.S. 635 (1987). In this case, Baker contends that Chaplin used excessive force when he hit her with his riot baton.

The Minnesota Supreme Court determined that the law concerning excessive force was clearly established at the time Chaplin acted, relying on the decisions of the U.S. Supreme Court in *Graham v. Connor*, 490 U.S. 380 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985). Pet. App. 3a, 10a. Contrary to the Petitioner's argument, the Court did not base its decision on the general language of the Fourth Amendment. It relied on the ample development of the law concerning the use of excessive force, including the decisions of the Supreme Court of the United States (*Graham* and *Garner*), as well as the decisions of the U.S. courts of appeal. Pet. App. 7a-11a. Its decision on this issue is consistent with the decisions of this Court. In addition it is consistent with the decisions of the U.S. courts of appeal. *Posr v. Doherty*, 944 F.2d 91 (2nd Cir. 1991); *Calamia v. City of New York*, 879 F.2d 1025 (2nd Cir. 1989); *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993); *Jackson v. Hoylman*, 933 F. 2d 401 (6th Cir. 1991); *Holt v. Artis*, 843 F.2d 242 (6th Cir. 1988); *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992); *Gainor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992); *Williams-El v. Johnson*, 873 F.2d 224 (8th Cir. 1989); *Patzner v. Burkett*, 729 F.2d 1363 (8th Cir. 1985);

Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993); *Street v. Parham*, 939 F.2d 537 (10th Cir. 1991); *Dixon v. Richer*, 922 F. 2d 1456 (10th Cir. 1991).

Petitioner contends that the decision of the Minnesota Court of Appeals is in conflict with two decisions of the U.S. courts of appeal: *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), and *Rice v. Burks*, 999 F.2d 1172 (1993). However, this attempt to create a conflict is mistaken. One of the decisions (*Barts*) did not involve the use of excessive force. The other (*Rice*) did not turn on whether the law concerning the use of excessive force was clearly established.

The *Barts* case did not involve the issue of excessive force. Instead, *Barts* involved a claim that the defendant police officer had violated clearly established constitutional rights when he took Ms. Barts to the police station (with her consent) for further questioning concerning a murder which she claimed to have witnessed. At the station, Ms. Barts confessed to the murder after three hours of questioning. The Eleventh Circuit considered whether, at the time of the incident, the law was clearly established that it was an unconstitutional seizure in violation of the Fourth Amendment for a police officer to take a person to a police station with her consent for further questioning under the exceptional circumstances present in the *Barts* case. Ms. Barts made no claim that the defendants had used excessive force.

The Eleventh Circuit's decision that the law was not clearly established was based upon its review of the state of the law concerning the Fourth Amendment's prohibition against unreasonable seizures as it existed at the time

of the incident. It held that the law concerning the type of seizure made by the defendant was not clearly developed because some courts had specifically found seizures similar to the defendant's seizure of Ms. Barts were constitutionally permissible. *Barts v. Joyner*, 865 F.2d 1187, 1191-93 (11th Cir. 1989). The Court did not even address the state of the law concerning the use of excessive force, since that issue was not part of the case.

In the present case, Petitioner has failed to identify any developments or changes in the law concerning the use of excessive force. The *Graham* fact-based standard of reasonableness reflects the law as it existed when Chaplin hit Baker.

The Seventh Circuit's decision in *Rice v. Burks* does not demonstrate the kind of significant conflict with the Minnesota Supreme Court's decision to justify granting certiorari for two reasons. First, the decision in *Rice* does not turn on whether the law concerning the use of excessive force was clearly established. Secondly, other decisions of the Seventh Circuit have held that the contours of the law concerning excessive force has been clearly established.

The *Rice* decision involved a claim by a fleeing suspect that he had been struck in the back by a police officer. The plaintiff failed to produce any evidence of what had been used to strike him or what circumstances existed at the time he was hit. However, it was undisputed that he was fleeing from the officers. Despite the dicta used by the Court concerning the state of the law regarding the use of force, the court did not identify any new developments or changes in the law.

The real thrust of the Court's decision does not focus on the state of the law. Instead it focuses on the fact that the plaintiff failed to produce sufficient evidence to show that the defendant police officers' use of force was not objectively reasonable, given that he was attempting to escape at the time. If the Court's decision had been based on its determination that the law concerning the use of excessive force was not clearly established, there would have been no need to address the objective reasonableness prong of the *Anderson* qualified immunity standard.

In addition, the dicta in the *Rice* decision does not reflect the position of the Seventh Circuit on the question whether the law of excessive force has been clearly established. Other decisions of the Seventh Circuit Court of Appeals make it clear that it finds the *Graham* standard for the use of excessive force is clearly established law. See, e.g.: *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993); *Ellis v. Wyndala*, 999 F.2d 243 (7th Cir. 1993); *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992).

In his attempt to convince this Court that the Minnesota Supreme Court's decision is in conflict with the decision of one or more of the U.S. courts of appeal, Petitioner argues that the Minnesota Supreme Court's decision is erroneous because the Court failed to identify any other case involving a police officer who was providing security during a Presidential visit. Petitioner commits the error of overly particularizing the constitutional right at issue which this Court has cautioned against.

The "clearly established law" element of *Anderson v. Creighton* does not require exact factual identity between

the present case and previously decided cases. As this Court has stated:

> [T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . .

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The rule was accurately explained by the Court of Appeals for the D.C. Circuit in *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984):

> The right at issue can be defined neither so broadly as to parrot the language in the Bill of Rights nor so narrowly as to require that there can be no distinguishing facts between the instant case and existing precedent. The former reading of *Harlow* would of course undermine the premise of qualified immunity that government actors reasonably should have known that their conduct is problematic. The later reading on the other hand, would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation.

Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984). Chaplin's argument commits the later error.

The fact that there have not been any reported cases in which a plaintiff claimed that a police officer used excessive force while involved in providing crowd control during a presidential visit is not significant for two reasons. First, there are no facts in the record supporting

Chaplin's claim that the President was in the area or even that he was about to enter the area. Secondly, he fails to explain what there is about crowd control when the President happens to be in town that would change the Constitutional standard governing the use of force. *Graham v. Connor* would still provide the applicable legal standard governing his conduct.

MATERIAL FACT DISPUTES CONCERNING THE PREDICATE FACTS NECESSARY TO APPLY THE OBJECTIVE REASONABLENESS STANDARD FOR QUALIFIED IMMUNITY PREVENTS SUMMARY JUDGMENT.

The Petitioner's second argument in support of his petition for certiorari is that the Minnesota Supreme Court erroneously applied the "objective reasonableness" prong of the *Anderson* qualified immunity test. His argument seriously misstates the basis on which the Minnesota Supreme Court reached its ruling and ignores the fact that the court's analysis is consistent with the prior decisions of this Court and with the decisions of the U.S. courts of appeal which have taken up this issue.

The Minnesota Supreme Court ruled that Chaplin was not entitled to summary judgment on the issue of qualified immunity because material predicate facts necessary to resolve the issue of qualified immunity were in dispute. It correctly applied this Court's holding in *Anderson v. Creighton* by applying the objective reasonableness standard. Pet. App. 11a-15a. It used an objective, rather than a subjective standard, and did not consider Chaplin's state of mind. Pet. App. 12a. It judged his actions "from the perspective of a reasonable officer

on the scene, rather than with the perspective of 20/20 vision of hindsight". Pet. App. 11a. It considered all the facts and surrounding circumstances using an objective standard. Pet. App. 12a.

After completing its analysis, the Minnesota Supreme Court found that significant material facts were in dispute concerning the circumstances that existed at the time Chaplin hit Baker and the specific actions Chaplin took. The Minnesota Supreme Court specifically identified a number of disputed fact issues that prevented summary judgment on the qualified immunity issue, including Baker's actions prior to being hit by Chaplin, the location of her injury, the nature of the force used by Chaplin App. 4a-5a; 14a. The Court concluded:

> . . . the legal question of the reasonableness of the officer's actions turns on the determination of such predicate facts. [Citation omitted.] This court cannot decide as a matter of law whether the officer's actions in this case were reasonable without a finding of fact as to what those actions and the surrounding facts and circumstances were.

Pet. App. 13a

The conclusion of the Minnesota Supreme Court that disputed predicate facts prevents summary judgment on qualified immunity is consistent with the decisions of the Supreme Court of the United States. This Court has held that standard summary judgment principles apply in cases involving the issue of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987). See also, *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982).

There is no conflict among the U.S. courts of appeal on this issue, or between the decision of the Minnesota Supreme Court and the U.S. courts of appeal. The Minnesota Supreme Court followed the ruling of the 8th Circuit in *Gainor v. Rogers*, which also held that disputed material facts necessary to determine the issue of qualified immunity requires denial of summary judgment on that issue. *Gainor v. Rogers*, 473 F.2d 1379 (8th Cir. 1992). The same result has been reached by other U.S. courts of appeal. *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir. 1993), *cert den. Vanocher v. Lampkin*, 114 S. Ct. 1400 (1994). The Petitioner did not cite a single U.S. court of appeal which has taken a conflicting position.

Chaplin also incorrectly represents to this court that the Minnesota Supreme Court decided that application of the objective reasonableness standard is a jury issue. This seriously misstates the decision. The Minnesota Supreme Court explicitly held that the issue is a legal issue that must be decided by the court. Pet. App. 6a, 15a.

When the Petitioner cites that portion of the decision which states that "a jury could conclude . . . that no objectively reasonable police officer would find Chaplin's use of force lawful", he does not provide this Court with a complete and accurate picture of the lower court's decision. He fails to advise this Court that the cited language appears in the section of the decision in which the Minnesota Supreme Court analyzed whether disputed material fact issues exist concerning the predicate facts necessary to determine the question of qualified immunity. The reference to what a jury could conclude is simply a recognition that Baker met her burden of production by producing sufficient evidence to demonstrate

that material fact issues exist which was established by this Court in *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986) and *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-6 (1986).

The Petitioner erroneously states that the Minnesota Supreme Court ruled that Chaplin was not entitled to qualified immunity. It simply affirmed the trial court's denial of summary judgment on this issue. It explicitly held that when the underlying fact issues necessary to resolve Chaplin's entitlement to qualified immunity had been resolved, the trial court "could make another *legal* determination regarding the issue of the reasonableness of Chaplin's actions, and may find that Chaplin does enjoy qualified immunity from liability." (emphasis in original) App. 15a, fn 10. Its decision correctly reflects the law as established by this Court.

CONCLUSION

The Petitioner has failed to establish any adequate basis for this Court to grant certiorari to review the decision of the Minnesota Supreme Court. The decision is correct and is consistent with the decisions of the Supreme Court of the United States and of the U.S. courts of appeal which have addressed the same issues presented by the present case. Petitioner has failed to show that any significant conflict exists between the decision of the Minnesota Supreme Court and the decisions of the U.S. courts of appeal which have considered the doctrine of qualified immunity in excessive force cases.

Sgt. Chaplin's Petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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430 First Ave. North, Suite 300
Minneapolis, MN 55401-1780
(612) 334-5785 Ext. 237

Counsel for Respondent

November 1994

APPENDIX

WCCO Videotape – I-Team Report of Incident on September 27, 1990

The videotape is included in the record in the Minnesota Supreme Court. A copy of the videotape has been lodged separately with the Clerk of the Supreme Court of the United States.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Type of Case: Other Civil
Court File No.: 91-22065

Janine Anne Baker,

Plaintiff,

vs.

William Chaplin, et al,

Defendants.

AFFIDAVIT OF JANINE (ANNIE) BAKER

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

Janine (Annie) Baker, being first duly sworn, on oath states:

1. I am the Plaintiff in the above-entitled action.

2. I have reviewed the affidavits, exhibits, and memorandum submitted by Defendant Chaplin in support of his Motion for Summary Judgment.

3. I was present during a demonstration held on September 27, 1990, at the Hyatt Hotel in Minneapolis. I was wearing a costume and a President Bush mask during the demonstration. The purpose of the costume was to attract the President's attention by using humor.

4. The demonstration began across the Nicollet Mall from the Hyatt Hotel with speeches by various people.

After a period of time, the demonstration moved down the Nicollet Mall and around the corner to Grant Street between the Nicollet Mall and LaSalle. I walked with other people who were part of the demonstration down Nicollet Mall and crossed Grant Street. I then walked down the sidewalk on Grant. Police barricades had been set up in the street along the Grant Street sidewalk. I stayed behind the barricades in the area the police had designated for the demonstration. The other demonstrators did so as well.

5. I have reviewed the WCCO I-Team videotape which reported on the incident in which Sgt. Chaplin hit me in the chest.

6. At one point, the videotape shows me, in my George Bush costume, holding a sign and dancing around a person playing a drum. This occurred when I was walking on the Nicollet Mall with the other demonstrators from the site across from the main entrance to the hotel where the speeches were held to the Grant Street sidewalk. The videotape shows me walking on the Nicollet Mall, moving towards Grant Street. Police were not prohibiting demonstrators from using the Nicollet Mall. The mall had been blocked against use by regular traffic by police during the demonstration.

7. After I crossed Grant Street and reached the sidewalk, I remained behind the police barricade in the area the police had designated for the demonstration.

8. The portion of the videotape showing me in the Nicollet Mall occurred more than 30 minutes prior to the time that Sgt. Chaplin hit me.

9. Contrary to the claim of Defendant Chaplin in his memorandum and the affidavit submitted in support of his motion, I never attempted to go past the police barricades and into the street. At all times after the demonstration moved to the Grant Street sidewalk area, I remained behind the police barricades. After crossing Grant Street, I moved down the sidewalk to the corner of Grant and LaSalle. I stood at the corner holding my sign, behind the barricades.

10. Prior to the time Sgt. Chaplin hit me, there was only one time that any demonstrators crossed the police barricade prior to the time that I was hit. This was when a man from the Up and Out of Poverty group (who I now know was Mark Thesius) ran past the barricade and into Grant Street before police officers pushed him back behind the police line. This incident is shown on the WCCO I-Team videotape. I could see it from where I was standing, but I was not a part of it. There was at least one police car between where I was standing and where the incident occurred.

11. Shortly after Mark Thesius ran past the police barricade and was pushed back by the police, the barricade in front of me fell over. I did not push the barricade over.

12. As the WCCO videotape shows, a police officer was standing in front of me and began setting up the fallen barricade. The police officer directed me and other demonstrators to move back, and we complied with the orders of the police. I did not move forward and made no attempt to cross the barricade and move into Grant Street. I did not interfere with the police officer's efforts to set

up the fallen barricade. No one tried to move into Grant Street when the barricade in front of us fell over.

13. I was standing at a corner where two barricades met. One barricade was set up along Grant Street, the other was set up along LaSalle Avenue (to my left).

14. Next to the LaSalle Avenue Barricade (in between the barricade and LaSalle) a row of police cars and vans was parked. These cars and vans are visible in the WCCO videotape. The police cars and vans blocked demonstrators from going into LaSalle Avenue and formed a second barricade keeping demonstrators behind the wooden barricades at the corner of Grant and LaSalle.

15. As the Grant Street barricade was being re-erected, I was moving backwards in compliance with the directions of the police officers who were setting up the barricade again. I was being pushed by them towards the LaSalle Avenue barricade, and I put my hand on that barricade to steady myself. Other demonstrators were doing the same thing. I felt the LaSalle Avenue barricade start to tip over and it fell shortly afterward.

16. As the videotape shows, when the barricade fell over, I was standing still. I was not "surging" forward. I did not move to cross either the fallen LaSalle Avenue barricade or the Grant Street barricade, as the videotape shows. I did not try to go into either street. Also, none of the demonstrators who were standing near me made any attempt to move across the barricades and into the streets.

17. Prior to the time Sgt. Chaplin struck me, the crowd was not agitated or out of control. Demonstrators

had followed the directions of the police about staying behind the barriers. The only exception to this was the person (Mark Thesius of Up and Out of Poverty), who had made an earlier attempt to cross the barricade. (See Paragraphs 10-11.)

18. At the time Sgt. Chaplin hit me in the chest, President Bush was not anywhere in the area. A decoy limousine had been parked behind a garage door across Grant Street from me and the other demonstrators. The President did not use this limousine. In fact, the President and the others in his group left the Hyatt Hotel in the presidential motorcade using a completely different exit which could not be seen from the place where the demonstration was occurring.

19. Sgt. Chaplin aimed for and hit me directly in the sternum, close to my heart. I was standing still at the time he hit me, as the WCCO video shows.

20. Sgt. Chaplin's blow caused me a very serious and painful injury. I received medical treatment for it from Dr. Virant. He diagnosed my injury as a sternal contusion, involving a bruise to the sternum and damage to cartilage and other soft tissues in my chest.

21. My injury has also caused soft tissue injuries to my neck and spine. Dr. Virant has advised me these were caused as a result of my body making adjustments following the injury to my chest.

22. A true and accurate copy of a report prepared by Dr. Virant is attached as Exhibit A.

23. I also experienced emotional trauma caused by Sgt. Chaplin's attack, which required treatment by Dr.

Stanley Rosenthal. A true and accurate copy of a report prepared by Dr. Rosenthal regarding his treatment of me is attached as Exhibit B.

24. Neither Sgt. Chaplin nor any other police officer was attempting to arrest me when Sgt. Chaplin hit me. I was not resisting arrest, nor was I attempting to flee from any police officer. As the WCCO videotape shows, I was standing still and was not making any kind of threatening moves towards Sgt. Chaplin or any other police officer.

/s/ Janine Anne Baker
Janine Anne Baker

Subscribed and sworn to before me
this 13th day of April, 1992.

/s/ Roderick J. Macpherson, III
Notary Public

(SEAL)

CASE TYPE: DECLARATORY JUDGMENT/
INJUNCTION/CONTRACT

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

MINNEAPOLIS POLICE OFFICERS FEDERATION, a non-profit corporation; and WILLIAM CHAPLIN,

Plaintiffs,

vs.

CITY OF MINNEAPOLIS, a municipal corporation,

Defendant.

Court File No.

AFFIDAVIT OF SERGEANT WILLIAM CHAPLIN

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

Sergeant William Chaplin, being first duly sworn, on oath states as follows:

1. I am a police officer employed by the City of Minneapolis and a resident of the City of Minneapolis, Hennepin County, Minnesota. I am also a member of the Police Officer's Federation of Minneapolis.

2. On September 27, 1990, I and other officers were assigned and ordered to provide security and protection for President Bush during his appearance at the Hyatt

Regency Hotel in downtown Minneapolis. Many protestors had gathered at the hotel on the morning of September 27, 1990 to protest the United States military presence in the Persian Gulf region, among other things.

3. Prior to the arrival of the President, I and other officers attended various training exercises relating generally to strategy and tactics for protecting dignitaries and specifically to the security plan for protecting President Bush.

4. In accordance with the security plan, police barricades were erected in order to maintain a secure area surrounding the hotel on the morning of September 27, 1990.

5. The collective demeanor of the protestors deteriorated to the point at which it was determined that a security risk existed. For that reason, the route by which the President departed the hotel was changed. Nevertheless, I and the other officers were obligated to maintain the secure area.

6. One protestor dressed in a business suit and wearing a rubber mask of the likeness of President Bush knocked over the barricade and crossed into the security area. Consistent with the training I was given and with the plan for protecting President Bush, I took prompt action to diffuse the threat. I struck the encroaching protestor by applying a trained maneuver in which the officer strikes the subject in the chest with a baton.

7. My use of force was subsequently investigated by the Internal Affairs Division of the Police Department.

Following the investigation, I was exonerated from any wrongdoing.

8. On January 4, 1991, the City of Minneapolis, acting through Chief Laux, rejected the Internal Affairs finding and commenced a disciplinary proceeding against me on the grounds that the use of force was not justified.

9. I have appealed the disciplinary action and the matter is proceeding toward arbitration.

10. Upon information and belief, Peter Ginder, Assistant City Attorney, is representing the City of Minneapolis in prosecuting its disciplinary action against me.

11. Upon information and belief, on or about August 23, 1991, Mr. Ginder received a letter from Roderick J. MacPherson, a Minneapolis attorney representing Jeanine Anne Baker, the protestor who I struck on September 27, 1990. In the letter, MacPherson stated that he had been directed to commence a lawsuit against me and the City of Minneapolis for injuries allegedly sustained by Ms. Baker on September 27, 1990. Enclosed with the letter was a draft of a Summons and Complaint naming me and the City of Minneapolis as co-defendants. The letter further indicated that if the City did not settle the matter within 30 days, the lawsuit would be filed.

12. On or about September 16, 1991, I wrote to Chief Laux and Robert Alfton, the City Attorney, to advise them that, because of the disciplinary action which had been commenced against me by the City, there was obvious conflict of interest which precluded joint representation of the City and me in the lawsuit threatened by Ms. Baker. Accordingly, I requested in the letter that the

City acknowledge its obligation to provide me with counsel under Article 18 of the Labor Agreement, allow me to choose counsel, and agree to pay the costs of my counsel.

13. Despite my request for representation, the City has failed and refused to acknowledge the existence of a conflict precluding joint representation or its obligation to pay for a separate attorney to represent only me.

14. On Friday, October 11, 1991, I was served with a Summons and Complaint in the Hennepin County District Court action entitled "Jeanine Anne Baker, plaintiff v. William Chaplin, individually and in his official capacity as a Minneapolis police officer; and City of Minneapolis, defendants." The period in which I am required to answer or otherwise respond to the Complaint expires on Thursday, October 31, 1991.

15. I cannot afford to hire an attorney to defend me in this action. Therefore, I will suffer immediate, irreparable harm if the City does not honor its obligation under statute and Article 18 of the Labor Agreement to provide me with legal representation and pay the costs of such representation.

FURTHER YOUR AFFIANT SAYETH NAUGHT

Date: 10/22/91 /s/ William Chaplin
William Chaplin

Subscribed and sworn to (SEAL)
before me
this 22nd day of October, 1991.

/s/ James P. Michels
Notary Public